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No. 05-356

IN THE

Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,

Petitioner,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

INTRODUCTION

The government does not deny that the question presented—whether a federal employee may challenge the relief granted in administrative proceedings under Title VII without relitigating liability—is an important and recurring one, significantly affecting the interests both of federal employees and the federal government. As the cases cited by both sides make clear, the issue arises often in Title VII litigation at both the trial and appellate levels. Indeed, the importance of the issue is only underscored by the government's recent and concerted effort to press its position in the courts of appeals—an effort that first succeeded in a federal appellate court only in 2003, more than 30 years after Title VII was extended to cover federal employees.

Nor does the government dispute that the issue has produced disagreement and squarely conflicting rulings among the federal courts of appeals (as well as many federal district courts). Instead, the government relies principally on its view that its position is correct. It is not surprising that the United States could advance arguments on the merits for its position on an issue that has divided the lower courts, but that is hardly a reason to deny definitive resolution of an important issue on which the circuits are in conflict. Secondarily, the government disparages the split as "shallow." That characterization rests not only on the supposition that the Fourth Circuit will change its mind on the issue, but also on a failure to acknowledge very real differences in the approaches taken by other circuits whose decisions are implicated in the split.

Indeed, the government goes so far as to suggest that there is no conflict between the decision below and the Ninth Circuit's decision in *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995), even though the D.C. Circuit acknowledged that *Girard* "had arrived at the opposite conclusion" and expressly rejected *Girard*'s holding and reasoning. *See* Pet. App. 6a, 7a. Just as in *Girard*, the government here seeks a second bite at the apple to litigate liability issues it not only lost but

failed to contest at the administrative level. The D.C. Circuit allowed the government such a second bite, but the Ninth Circuit, among others, would not.

I. The Circuit Split Is Neither "Shallow" Nor Illusory.

The government acknowledges a "genuine conflict" between, on one hand, the decision below, *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003), and *Morris v. Rumsfeld*, 420 F.3d 287 (3d Cir. 2005), and, on the other, the Fourth Circuit's decisions in *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993). Opp. 15. The government nonetheless urges the Court to disregard this open conflict because, in another case that presents a number of issues (including the issue in this case), the Fourth Circuit ordered an en banc hearing that tersely directed counsel to "be prepared to discuss at oral argument whether existing circuit precedent should be overruled." *Laber v. Harvey*, No. 04-2132 (4th Cir. Aug. 3, 2005).[1]

Pecker and *Morris*, however, remain the law of the Fourth Circuit, and speculation that they may be overruled provides no basis for overlooking the overt and admitted conflict among the circuits they reflect. Moreover, to the extent that the Fourth Circuit thought the issue merited en banc consideration, that only reflects the importance of the issue as well as the Fourth Circuit's recognition of the need to resolve the disagreement among the lower courts reflected in the D.C. Circuit's ruling in this case.[2]

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[1] Although the court styled its order as one setting the case for "rehearing" en banc, it was a rehearing only in the sense that the panel had already heard argument; there was no panel opinion.

[2] Should the Court consider the Fourth Circuit's disposition of *Laber* to be material to its decision whether to grant certiorari in this case, petitioner respectfully suggests that the Court might wish to hold this petition briefly pending decision in *Laber*, particularly in light of the Fourth Circuit's practice of promptly deciding cases after oral argument. If *Laber* reaffirms *Pecker* and *Morris*, the government itself will undoubtedly seek

(*Footnote continued*)

In any event, the Fourth Circuit is not the only circuit whose rulings cannot be reconciled with *Timmons*, *Rumsfeld*, and the decision below. Most notably, the D.C. Circuit flatly disagreed with the Ninth Circuit's decision in *Girard*. But the government, in stark contrast to the court below, asserts that the decisions are not in conflict because *Girard* was only a case about "waiver" of a statute of limitations defense.

While *Girard* couched some of its analysis in terms of waiver, its reasoning was the same as that of *Pecker* and *Morris*: The court held that the government was bound by administrative findings concerning liability that a federal employee in a Title VII action did not challenge. *Girard* explicitly held that because the EEOC had issued a "binding" decision on the statute of limitations issue, and because "an employee could seek review of parts of a favorable EEOC decision without risking a review of the remainder of that decision," the government was "not entitled to a second bite at the apple in the district court" with respect to liability rulings the employee did not contest. 62 F.3d at 1247.[3] *Girard* expressly relied on *Morris*, which it said held that "final decisions of [the] EEOC are binding on federal agencies and in seeking review an employee may tailor his request for relief." *Id.* As the D.C. Circuit forthrightly acknowledged, its holding cannot be squared with *Girard*. The government's contrary argument requires it to ignore what both *Girard* and the D.C. Circuit said. Indeed, even viewed solely as a "waiver" decision, *Girard* is at odds with the decision below, because in this case the government waived its opportunity to contest

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resolution of the conflict, and this petition will present the most expeditious means to that end.

[3] The Second Circuit's decision in *Briones v. Runyon*, 101 F.3d 287 (2d Cir. 1996), which adopted *Girard*'s holding, also referred to waiver, but its central holding is that the government cannot be "at war with itself" and insist on a "second bite at the apple" on issues that the plaintiff won at the administrative level, *id.* at 291, the same issue presented here.

liability in the administrative proceedings by failing to respond to the plaintiff's prima facie case, just as much as it waived its limitations defense in *Girard*.

The government's assertion that subsequent Ninth Circuit decisions undercut *Girard* is equally unavailing. *Friel v. Daley*, 230 F.3d 1366 (Table), 2000 WL 1208197 (9th Cir. 2000), in addition to being unpublished and of no precedential weight, holds only that a plaintiff who *asks for a de novo trial on liability* cannot bind the agency to favorable administrative findings. As for *Farrell v. Principi*, 366 F.3d 1066, 1068 n.2 (9th Cir. 2004), that case did not present this issue, and the panel's statement that it did not express an opinion on the issue can hardly overrule *Girard*, which did. Indeed, in the Ninth Circuit, a panel cannot overrule a decision of a prior panel, even if the first panel's decision arguably contains dicta. *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc). *Girard* is the law of the Ninth Circuit, and it is at odds with the decision below.[4]

The government's attempt to distinguish *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987), is equally unavailing. The government quotes a footnote in which the *Haskins* court stated that a plaintiff who asks for a de novo trial on liability is not entitled to rely on favorable administrative fact findings, Opp. at 17 (citing 808 F.2d at 1199 n.4), but it fails to come to grips with the court's holding that when, as in *Haskins*, the plaintiff seeks only additional remedies for the discrimination found at the agency level, "*the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests.*" *Id.* at 1200 (emphasis added). The court then proceeded to do exactly that: It accepted the ad-

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[4] District Court decisions in the Ninth Circuit are consistent with *Girard*. *See Charles v. Dalton*, 1996 WL 53633 (N.D. Cal. Jan. 31, 1996); *Hashimoto v. Dalton*, 870 F. Supp. 1544 (D. Haw. 1994), *aff'd*, 118 F.3d 671 (9th Cir. 1997).

ministrative finding of liability and went on to consider whether the plaintiff was entitled to an additional remedy (ultimately finding that he was not).

The government also mischaracterizes the Seventh Circuit's opinion in *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), *vacated on other grounds sub nom. West v. Gibson*, 527 U.S. 212 (1999), as involving only an "enforcement" action. Opp. at 17. But the government itself admits that in addition to seeking enforcement, the plaintiff sought another remedy—damages—not afforded in the administrative process. *Id.* ("employee filed suit to enforce agency decision *and to obtain compensatory damages* ...") (emphasis added). The Seventh Circuit relied on *Morris* in holding that the plaintiff could pursue the damages claim without relitigating liability because "the EEOC's final determinations of discrimination are binding against government agencies unless the complainant himself seeks de novo review of that finding in federal court." *Id.* at 993. Although the decision no longer has precedential weight because this Court vacated it for an unrelated reason, it illustrates the disagreement among appellate courts that have addressed the issue (as, indeed, does the First Circuit's opinion in *Rivera-Rosario v. U.S. Dept. of Agriculture*, 151 F.3d 34, 37 (1st Cir. 1998), which notes and reserves decision on the conflict). Similarly, the many recent district court opinions reaching opposing conclusions on the issue (*see* Pet. at 22-23 n.11), which the government ignores, underscore the need for definitive resolution of the issue.

Moreover, the decision below is completely inconsistent in principle with decisions holding that a federal employee who prevails in agency proceedings but is denied attorneys' fees in the final agency decision may bring a Title VII action seeking the additional remedy of fees without relitigating liability. *See, e.g., Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978); *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980). The government characterizes such holdings as "old cases" and claims that they were effectively overruled by *North Caro-*

lina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986), which held that 42 U.S.C. § 1988 does not permit a stand-alone suit for attorneys' fees. But as a number of courts have held since *Crest Street*, the significant differences between Title VII and Section 1988 make *Crest Street*'s holding inapplicable to Title VII cases. *See, e.g., Slade v. Heckler*, 952 F.2d 357, 360 (10th Cir. 1991) (holding that *Crest Street* "is not dispositive" and that Title VII authorizes a stand-alone action for fees by a federal employee plaintiff).[5]

Unlike Section 1988, which authorizes *a court* to award fees only in an action to enforce specified laws (*see Crest Street*, 479 U.S. at 12), the remedial provisions of Title VII provide for awards of fees *by the EEOC* to plaintiffs who prevail in administrative proceedings as part of the agency's power to award "appropriate remedies." *See* 42 U.S.C. § 2000e-16(b); *see also* 29 C.F.R. § 1614.501(e) (providing for presumptive award of attorneys' fees by EEOC to prevailing plaintiffs). As the First Circuit explained in *Fischer*, a plaintiff who prevails before the EEOC but is wrongly denied attorneys' fees may bring a Title VII action as an "aggrieved party" to recover the "full relief" to which he is entitled—without relitigating liability. 572 F.2d at 411.[6] Nothing in *Crest Street* calls that analysis into question. Under the rea-

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[5] *See also Aurecchione v. Schoolman Transp. System, Inc.*, 426 F.3d 635 (2d Cir. 2005) (court has jurisdiction over stand-alone suit for attorneys' fees under Title VII); *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (same); *Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir. 1990) (en banc) (*Crest Street* does not overrule *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988) (same).

[6] *Chris v. Tenet*, 221 F.3d 648 (4th Cir. 2000), on which the government heavily relies, is inapposite because there the plaintiff did not *prevail* in the administrative proceedings; he settled. *Cf. Hansson v. Norton*, 411 F.3d 231 (D.C. Cir. 2005) (district court lacks jurisdiction to award fees where fee entitlement arises from settlement at administrative level).

soning of the D.C. Circuit, however, such a plaintiff would be required to relitigate both liability and his entitlement to substantive relief before bringing a fee action.

II. The Decision Below Is Not Correct.

The government's insistence that the decision below is compelled by the plain language of the statute is contradicted by the government's admission that a Title VII plaintiff who prevails in administrative proceedings can bring an "enforcement" action without relitigating the issue of liability. *See* Opp. at 3 (acknowledging that a federal employee "may go into federal court to 'enforce' a binding decision 'without risking de novo review on the merits.'"). If, as the government insists, an "action" under Title VII always meant a trial de novo on liability, in which a court could not grant the plaintiff relief without making its own de novo finding of liability, Title VII would preclude such enforcement actions.

The government's only attempt at an answer is that Title VII enforcement actions are actually not Title VII actions at all, but really APA actions under 5 U.S.C. § 701 *et seq.*, and/or mandamus actions under 28 U.S.C. § 1361. Opp. 11. The government's position, however, is contrary to uniform precedent holding that such enforcement actions *are* actions under Title VII. In the leading case of *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982), the Ninth Circuit held that a final agency action in a Title VII case "was the proper subject of an enforcement order" under 42 U.S.C. § 2000e-5(g), which it described as providing that "in [a] Title VII case [a] district court may order appropriate relief." *Id.* at 1378.[7] Likewise, *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), described the case before it as a "Title VII action," and no-

[7] Confirming that it was granting relief under Title VII, the court also affirmed an award of attorneys' fees to the prevailing plaintiff, which would not necessarily have been available in an APA action.

where suggested that an enforcement action arose under any statute other than Title VII.

Most notably, in *Wilson v. Pena*, 79 F.3d 154 (D.C. Cir. 1996), the D.C. Circuit painstakingly analyzed the circumstances under which a plaintiff may bring an enforcement action, and repeatedly made clear that the plaintiff in such an action has "the right to sue under Title VII." *Id.* at 164; *see also id.* at 168 (referring to the plaintiff's "right to sue under Title VII"). Indeed, the principal issue in *Wilson* was how to apply Title VII's statute of limitations to an enforcement action, an issue that would never have arisen if the enforcement action arose under the APA or the mandamus statute. And significantly, the *government* argued that the action in *Wilson* was barred by Title VII's limitations periods, a position flatly at odds with its current assertion that an enforcement action does not arise under Title VII. The court in *Wilson*, moreover, fully accepted the government's premise that Title VII's limitations periods applied; it only disagreed with the government on their application to the particular facts.[8]

Moreover, the suggestion that an enforcement action arises directly under the APA or the mandamus statute rather than Title VII is contrary to both statutes, which generally provide their own remedies only when no other statutory proceeding for judicial review is available. *See* 5 U.S.C. § 704; *Environmental Defense Fund v. Reilly*, 909 F.2d 1497 (D.C. Cir. 1990) (APA review precluded where statute provides its own avenue for de novo district court review); *Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984) (mandamus review available only where there is no other adequate remedy). In view of Title VII's comprehensive authorization of

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[8] Similarly, in *Loe v. Heckler*, 768 F.2d 409 (D.C. Cir. 1985), the government argued that an enforcement action was barred by Title VII's statute of limitations. The court of appeals, while agreeing that the action was brought under Title VII and subject to its limitations provisions, disagreed with the government about when the period began to run.

judicial remedies to employees "aggrieved" by the outcome of the administrative process, 42 U.S.C. § 2000e-16(c), the suggestion that an enforcement action arises under the general review provisions of the APA or under the mandamus statute is untenable.

The availability of an enforcement action without de novo review of liability also puts to rest the government's contention that the principles of *Chandler v. Roudebush*, 425 U.S. 840 (1976), would be undermined if federal employees could take advantage of binding decisions in their favor in ways that private sector employees (who do not receive binding administrative decisions) cannot. Opp. 10. Of course, an enforcement action provides federal employees with an advantage private employees do not have. The government's acknowledgment that federal employees have the right to bring such actions refutes its suggestion that *Chandler* always requires parity between federal and private employees.

Chandler holds only that Congress did not intend to take away a federal employee's ability to obtain a trial de novo on liability if he is aggrieved by the administrative resolution of the liability issue. And, as the government points out, it further holds that if the plaintiff elects to seek a trial de novo on liability, administrative findings bearing on the issue are not binding, but may have evidentiary effect. Opp. 10. That is a far cry, however, from holding that a plaintiff *must* seek de novo review of favorable, final liability rulings as to which he is *not* aggrieved.

Nor can such a requirement be read into the statute's authorization of judicial remedies when a court "finds" that the agency has engaged in discrimination. Nothing in the statute precludes the possibility of the court finding discrimination based on a binding agency determination that discrimination has occurred, just as the court did in *Haskins* and just as it does in every enforcement action where relief is awarded.

Ultimately, the government's position in this case is that it may defend administrative action (in this case, the denial of

adequate remedies) on grounds different from those that served as the basis for the action—that is, having determined that discrimination occurred and that the proper remedy was the relief awarded, it may now defend the limited relief granted by arguing that no relief at all was warranted because no discrimination occurred. That position is contrary to the most basic tenets of judicial review of administrative action. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The government has no answer to this point, and so ignores it.

This case provides a telling illustration of the pernicious consequences of the government's position. Having prevailed in tortuous and lengthy administrative proceedings, in which the government did not even bother to put on witnesses to contest the discriminatory treatment he suffered, Harold Connor died before he could bring this action in court to challenge the remedy. Now that petitioner, Mr. Connor's personal representative, has sought to obtain the full redress to which Mr. Connor was entitled, the government not only insists that she is entitled to no redress unless she re-proves her case—without access to the key witness—but it reserves the right to put on the witnesses it withheld in the proceedings before the agency if she seeks a de novo trial on liability. The government's position makes a mockery of the very administrative proceedings that the statute was designed to foster as an alternative to litigation in court. *See West v. Gibson*, 527 U.S. 212, 218-19 (1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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